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No. 308

Supreme Court of the United States

OCTOBER TERM, 1968

JAMES J. RITTER, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S SUPPLEMENTAL MEMORANDUM

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Since the filing of Petitioner's Reply Brief two courts of appeals have rendered virtually conflicting opinions that underscore the need for a decision by this Court resolving the income tax consequences of expense reimbursements. *United States* v. *Gotcher,* 68-2 U.S. Tax Cas. para. 9546 (5th Cir., Aug. 27, 1968); *Commissioner* v. *Starr,* No. 9370 (10th Cir., Aug. 30, 1968). Copies of both opinions are reprinted in the appendix to this Memorandum.

In *Starr*, the Tenth Circuit reversed the Tax Court and held that reimbursements to a transferred employee for related temporary living expenses incurred solely for the convenience of his employer constituted income and were not deductible. The court, after holding the case under advisement for more than a year, ignored the Tax Court's reasoned conclusion that the reimbursements were non-compensatory, and held that whatever their purpose or effect, they were as a matter of law income and non-deductible.

By contrast, in *Gotcher* a foreign car manufacturer paid the expenses of the taxpayer—a prospective auto dealer—and his wife on a trip to Germany to examine the manufacturer's facilities. The Fifth Circuit rejected the matter-of-law approach followed in the *Starr* case and by the Court of Claims in the instant case and inquired whether the expense payments were actually income, that is, whether they conferred economic gain primarily to benefit the dealer. It looked to "the primary purpose of the expenses," stating "that the first consideration is the intention of the payor." In concluding that the payments on behalf of the dealer for his expenses "served a legitimate corporate purpose" and did not constitute income to him, the court emphasized that while the dealer "was not forced to go, there is no doubt that in the reality of the business world he had no real choice." Pp. 7a, 9a, *infra*. These same principles persuaded the court that the wife's trip was primarily a vacation and, accordingly, that portion of the payments constituted income.

These two decisions, pointing in opposite directions, confirm the need for Supreme Court review of the present case. The principles of *Gotcher* would surely

exclude from income expense reimbursements, such as those in the present case, the "primary purpose" of which was to serve the employer's "legitimate corporate purpose" by financing a job transfer as to which the employee "had no real choice." The *Starr* decision not only clashes with this conclusion, but it accentuates the existing conflict between several circuits and the Tax Court and the resulting dilemma facing petitioner and hundreds of thousands of other transferred employees.

Respectfully submitted,

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